

BEFORE THE
GOVERNING BOARD OF THE
HOLLISTER SCHOOL DISTRICT

In the Matter of the Accusation Against:

17 CERTIFICATED EMPLOYEES,

Respondents.

OAH No. 2011031443

PROPOSED DECISION

Administrative Law Judge Mary-Margaret Anderson, State of California, Office of Administrative Hearings, heard this matter in Hollister, California, on April 13, 2011.

Thomas Manniello, Attorney at Law, Lozano Smith, represented the Hollister School District.

Michelle A. Welsh, Attorney at Law, Stoner, Welsh & Schmidt, represented all of the Respondents.

The record remained open to receive letter briefs on the issue of estoppel. District's brief was timely received and marked for identification as Exhibit 14. Respondents' brief was timely received and marked for identification as Exhibit A.

The record closed on April 18, 2011.

SUMMARY

The Board of Trustees of the Hollister School District decided to discontinue particular kinds of services provided by teachers in the 2011-2012 school year for budgetary reasons. The decision was not related to the competency and dedication of those whose services were proposed to be eliminated. The process complied with Education Code requirements.

FACTUAL FINDINGS

1. Gary L. McIntire, Ed.D., filed the Accusation in his official capacity as Superintendent of the Hollister School District (District).

2. All Respondents are certificated employees of the District. A list of the Respondents is attached as Exhibit A.

3. On February 15, 2011, the Board of Trustees of the Hollister School District (Board) adopted Resolution 24:10-11, which contains criteria to be used to determine the order of termination of certificated employees with the same first date of paid service (tie-breaking criteria). In pertinent part, the Resolution states:

[T]hat the below-listed criteria, not in order of priority, be used in determining the order of termination . . . and that the Superintendent or designee applies the adopted criteria to the affected employees to determine order of termination as related to the needs of the District and its students, as described in the table appended to this Resolution (Appendix A).

The criteria are listed, “not in order of priority,” as follows:

- 1) Breadth of credential authorization
 - Multiple credentials or authorizations issued by the California Commission on Teacher Credentialing, allowing flexibility of assignment and ability to undertake multiple assignments as District’s needs change.
- 2) Advanced degrees in current assignment or credential-related subject areas on file with the Hollister School District.
- 3) Number of post-baccalaureate accredited college units on file with the Hollister School District in current assignment or credential-related areas.
- 4) Teaching experience in multiple subjects or grade levels in the Hollister School District.
- 5) Number of years teaching in California public elementary and secondary schools outside of the Hollister School District.

If and only if employees with common dates of hire have equal qualifications based upon application of the above criteria, the District, in the presence of a representative from HESTA if requested, will then break ties by utilizing a lottery.

4. Appendix A to Resolution 24:10-11 is entitled “Description of Tie-Breaker Criteria.” It states:

1: Breadth of Credential Authorization – For every credential, certificate or authorization awarded by *the California Commission on Teacher Credentialing* as of February 15, 2011,

an individual will receive 10,000 points. Certificates earned at workshops, and credentials that are not from California do not count.

2: Advanced Degrees – For every Masters or Doctorate from an accredited university that the District had on file as of September 10, 2010 (HESTA contract § 11.9.3), an individual will receive 15,300 points.

#3: Number of Post-Baccalaureate Accredited College Units – For each semester unit, an individual will receive 110 points. The Baccalaureate can be either a BA or BS; transcripts had to have been on file in the District Office as of September 10, 2010. (HESTA contract § 11.9.3)

#4: Teaching Experience in multiple subjects/grade levels – For every different past and present assignment *in the Hollister School District*, an individual may receive up to 15 points total, provided you taught in that assignment for a year or more (7.5 points for half a year or for a semester). Points are assigned per assignment; multiple years in the same assignment receive a maximum of 15 total points, regardless of the number of years in that assignment. Teachers newly assigned to a grade level or subject area for the 2010/11 school year, and who have taught in that assignment for at least half the school year, will receive 15 points in recognition of that assignment.

#5: Number of Years teaching in California public elementary and/or secondary schools – An individual will receive 1.3 points per year for every year taught in California, outside of Hollister, but only for public school service.

(Emphasis in original.)

5. Dennis D. Kurtz, Ph.D., Director of Personnel for the District, drafted a memo describing how the process would be implemented and a Seniority Tie Breaker Worksheet to be used to tally each affected teacher's points. He supplied these documents to the Board members for their consideration as they decided whether to issue Resolution 24:10-11.

6. On March 8, 2011, the Board adopted Resolution 30:10-11, in which the Board resolved to reduce or eliminate particular kinds of services at the close of the current school year. The reduction of the following full-time equivalent (FTE) positions was approved and are anticipated:

<u>Services</u>	<u>Number of Full-Time Equivalent Positions</u>
1. K-6 Elementary Classroom Teacher	12.0
2. Physical Education Teacher	3.0
3. Resource Teacher	.5
4. Special Education Mild/Moderate (ECSE) Teacher	2.0
4. Special Education Moderate/Severe (ECSE) Teacher	2.0
5. Special Education Mild/Moderate Teacher	1.0
6. Special Education Moderate/Severe Teacher	1.0
7. Music Teacher	1.0
8. Middle School Math Teacher	2.0
9. Middle School Science Teacher	1.0
10. Vice Principal	1.0
11. Intervention Teachers	7.0
Total Full Time Equivalent reduction:	33.5

7. Kurtz credibly testified concerning the reason for the projected reduction in services and the basis for the decisions regarding which services to reduce. The District continues to be in poor condition financially, and is currently in “negative status.” The state fiscal advisor has instructed the District to reduce expenditures, and staffing is a significant portion of the budget. The District plans some significant changes in grade level configuration. For example, a 6th grade class will be moved from a middle school to an elementary school site. That move will result in the need for one less teacher. In addition, an early childhood special education program is moving to the County Office of Education.

8. Attrition was considered in factoring the reductions, and will continue to be. Prior to March 15, 2011, only one employee had announced his or her resignation or retirement.

9. All state-mandated services will be provided as required in school year 2011-2012 under the proposed reductions.

10. On March 10, 2011, the Board adopted Resolution 29:10-11. It states “that the attached Order of Certificated Employment – ‘Seniority List’ represents the order of first day of paid service of permanent and probationary certificated employees in the Hollister School District and will be used to determine the order of certificated layoff.”

District staff makes every effort to ensure that the Seniority List is accurate and up to date. Every fall the list is sent to employees with a request to check it for accuracy. This was repeated again in late December 2010 or January of this year. As corrections come in, Kurtz makes the changes. This includes application of the tie-breaker criteria. Kurtz employs the tie-breaker worksheet to determine the order of employees with the same start date.

11. On March 10, 2011, written notice of the recommendation that their services will not be required for the 2011-2012 school year (the preliminary notice) was personally served on affected employees. The documents were also sent by registered mail.

12. Each of the Respondents filed a timely request for hearing. Accordingly, an Accusation was filed and served. Each Respondent filed a timely notice of defense.

13. Kurtz credibly testified about the basis for his decisions regarding which teachers and how many received a preliminary notice. Seven temporary teachers were given notices of non-reelection, and this was factored into the decision. For the other reductions, he looked at the total number of reductions needed and considered credentials, whether the tie-breaking criteria would be implemented, bumping rights, and other factors. For example, the total reduction for math was 1.0 FTE, but 1.8 FTE were noticed. This resulted in the total number noticed being slightly higher than the total authorized reductions.

14. On April 6, 2011, Respondent Lisa Jelinek was notified that the District was withdrawing her preliminary notice and that her services would be needed in 2011-2012.

Objections of particular teachers/employees

15. Frederick Brewster holds a multiple subject credential, a CLAD, and a clear administrator credential. He teaches 7th and 8th grade math, and has been attempting to earn a math authorization from the California Commission on Teacher Credentialing (CTC) for six years. Brewster related a near-Kafkaesque tale of attempts to satisfy the CTC. He is now very close to completing the requirements, and requests the Board grant him a waiver. Brewster presents a compelling case, but no authority exists to order the Board to grant a waiver to a teacher.

16. Diana Flores holds a multiple subject credential and a CLAD. The District noted her seniority date as August 24, 2005, for some years. Flores asserts that she began teaching for the District in 1999 pursuant to an emergency credential and only this year learned that she was entitled to a seniority date commensurate with that date.

If the records verify that she is entitled to an earlier seniority date, the District shall assign Flores a new seniority date in 1999 and rescind her layoff notice.

17. Erinn Mitchell holds a music credential and teaches middle school band and choir. She testified that she was hired to work alongside an experienced teacher so that she would have “the maximum amount of training to continue the program.” She requests that the District retain her because of her special training and experience, in preference to another teacher with more seniority; in essence, she requests to be “skipped.” No authority exists for such an order.

18. Jananne Gaver holds a multiple subject credential, a CLAD, and an administrative credential. Previously, her seniority date with the District was noted as August 21, 2002. In January 2011, an error was discovered by Kurtz and the date was changed to January 26, 2004. Gaver objects to the change.

The disagreement is grounded in Gaver's service in an administrative position. Several years ago she was considering applying to be a vice-principal or for a position in the District office. According to Gaver, Kurtz advised her to take the office position because of his prediction that the vice-principal job would be eliminated in the near future. (Kurtz does not recall the conversation.) Further, Gaver contends that District staff member Pam Little (Little's actual position was not identified) told her that only two years can be counted for seniority purposes when one is working as an administrator.

Gaver did not know there was a difference between working at a school site versus at the District office. She therefore took the position in the office, not realizing that this decision would cost her in seniority. She maintains that if she had known about the Education Code provisions concerning accrual of time for administrators, she would have made a different decision.

19. The Parties stipulated that Erinn Mitchell be given credit for 6.5 years of paid service pursuant to the tie-breaker criteria. Her position on the Seniority List shall be corrected accordingly.

20. The Parties stipulated that Barbara Penney be given credit for an additional 18 units of credit pursuant to the tie-breaker criteria. Her position on the Seniority List shall be corrected accordingly.

21. The Board's decision to reduce or discontinue the identified services was made solely on the basis of the needs of the District and its pupils.

22. No permanent or probationary employee with less seniority is being retained to render a service which any Respondent is certificated and competent to render.

23. All contentions made by Respondent not specifically addressed herein are found to be without merit and are rejected.

LEGAL CONCLUSIONS

1. All notices and other requirements of Education Code sections 44949 and 44955 have been provided as required. The District established jurisdiction for this proceeding as to each Respondent.

2. Respondents contend that the District has "over noticed," in that more teachers received preliminary notices than are required to effectuate the reduction in services. This argument is without merit.

Education Code section 44955, subdivision (b), provides, in pertinent part, that “whenever a particular kind of service is to be reduced or discontinued not later than the beginning of the following school year . . . the governing board may terminate the services of not more than a corresponding percentage of the certificated employees of the district . . . at the close of the school year.” This provision implies that a board must make a good faith effort to determine what services need to be reduced, to what extent, and who should be noticed. Here, the evidence established a careful consideration of all of the facts and circumstances prior to the issuance of the notices. No authority was presented to support the proposition that a District must commit at this stage in the process to exactly who and how many teachers will receive a final notice.

3. Cause was established as required by Education Code section 44955 to reduce the number of certificated employees of the District due to the reduction and discontinuation of particular kinds of services.

4. Respondent Gaver contends that the District should be estopped from changing her seniority date because she was given incorrect information by District staff and she relied on the information to her detriment. Equitable estoppel is available against a public agency if certain elements are met. The elements are: (1) a representation or concealment of material facts (2) made with knowledge of the facts (3) to a party ignorant of the truth (4) with intention that the latter act upon it and (5) the party must have been induced to act upon it. (See 7 Witkin, Summary of Cal. Law (1974 ed.), Equity § 132, p. 5352, and cases cited therein.) “Where one of these elements is missing there can be no estoppel.” (*California School Employees Assn. v. Jefferson Elementary School District* (1975) 45 Cal.App.3d 668, 692.) No showing was made that anyone from the District intentionally concealed a known material fact with the intent that Garver act on it to her detriment, or that Garver was induced to act upon it to her detriment. Rather, the evidence established that Garver and certain District staff were was ignorant of the relevant Education Code provision, that she was therefore given an incorrect seniority date, and that the date was corrected when the error was discovered.

In addition, case law provides that estoppel should not be invoked against the government when it would cause harm to a specific public policy or the public interest. (*Shoban v. Board of Trustees of the Desert Center Unified School District* (1969) 276 Cal.App.2d 534; *Fleice v. Chualar Union Elementary School District* (1988) 206 Cal.App.3d 886, 893 [estoppel cannot be invoked to contravene statutory provisions that define an agency’s powers].) The seniority dates of teachers are regulated by the Education Code. Section 44956.5 provides that employees do not gain time for seniority purposes when they work in an administrative position that is not at a school site. Application of equitable estoppel in the instant case would defeat the statutory scheme created by the Legislature that establishes seniority rights for teachers and provide Garver with greater rights than other employees.

Accordingly, there is no basis in fact or law to justify granting the requested relief.

ORDER

1. Notice may be given to Respondents listed in Exhibit A (except Lisa Jelinek) that their services will not be required for the 2010-2011 school year because of the reduction or discontinuation of particular kinds of services.

2. The Accusation against Lisa Jelinek is dismissed.

3. Corrections shall be made to the Seniority List in conformance with Findings 16, 19 and 20.

DATED: _____

MARY-MARGARET ANDERSON
Administrative Law Judge
Office of Administrative Hearings

EXHIBIT A: LIST OF RESPONDENTS

Last Name	First Name
Brewster	Frederick
Flores	Summer
Gauvreau III	Erika
Gaver	Dawn
Hagins	Angela
Hudson	Matthes
Jelinek	Julie
Larson	Kathleen
Mitchell	Erinn
Morales	Josh
Muscato-Schatz	Meghan
Ostoja	Richard
Pellin	Kellie
Penney	Barbara
Rivas	Joseph
Rodriguez	Patricia
Ruiz	Kathy